



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 14, 1994

Mr. Hugh W. Davis
Assistant City Attorney
The City of Fort Worth
1000 Throckmorton
Fort Worth, Texas 76102

OR94-543

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 25579.

The City of Fort Worth (the "city") has received a request for information relating to the city's franchise agreement with Southwestern Bell. Southwestern Bell asserts that drawings it has submitted to the city showing locations of extensions or replacements of its underground cables are excepted from required public disclosure under section 552.110 of the act. The drawings it asserts constitute a trade secret are attached to the Southwestern Bell letter brief as Exhibit 4, which it describes as "a complete copy of the Work Order D533127 drawings."

Section 552.110 protects trade secrets from required public disclosure. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . A trade secret is a process or device for continuous use in the operation of

the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

(1) the extent to which the information is known out side of [the company's] business; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and to [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. The governmental body or the company whose records are at issue must make a prima facie case for exception as a trade secret under section 552.110. See Open Records Decision No. 552 (1990) at 5.

Southwestern Bell asserts that the drawings in Exhibit 4, which reveal the location of fiber optic cable routes and identity of customers on the routes, constitute a trade secret for the following reasons:

The information contained in Exhibit 4 is compiled solely for Southwestern Bell's own purposes from its own records and is known only to those having a need to know. . . . Contractors hired to install fiber cable and other facilities for Southwestern Bell are required to sign a non-disclosure agreement

The information is virtually unknown to employees except for those employees in the Engineering Department who compile the information and prepare the drawings and the contractors and employees of the Construction Department and contractors who are involved in constructing the facility. . . .

Southwestern Bell classifies the information sought by this open records request to be protected against disclosure as proprietary information. The disclosure of this type [of] information by an

employee can subject the employee to a range of disciplinary action including dismissal. . . . Southwestern Bell's Code of Business Conduct . . . covers the unauthorized disclosure of proprietary information. . . .

The information in question, if released and available to Southwestern Bell's competitors, could cause financial harm in the loss of existing and future Southwestern Bell revenue streams. The drawings would provide numerous advantages to competitors [including market intelligence about fiber optic cable locations, information about customer identity and needs, and products and services provided to customers]. . . .

It is estimated at a minimum that the cost of Exhibit 4 [to prepare] was \$8,000. . . .

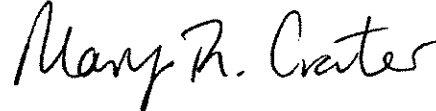
It would be virtually impossible for a competitor to acquire the information in question

We conclude that Southwestern Bell has established a prima facie case that the drawings in Exhibit 4 constitute a trade secret. Its assertions have not been rebutted as a matter of law. See Open Records Decision No. 552 at 5.¹ Therefore, the drawings must be withheld under section 552.110 of the act.

¹We have received a brief that asserts that Southwestern Bell has not demonstrated the first and fifth factors of the Restatement test. With respect to the first factor, the brief contends that the information is not a trade secret because Southwestern Bell submitted it to the city. We disagree. If the fact that information has been disclosed to a governmental body were to automatically disqualify information as a trade secret, the section 552.110 protection for trade secrets would be rendered meaningless, given that the act applies exclusively to information in the possession of governmental bodies. The brief also contends that the information is not a trade secret because Southwestern Bell is required to post above-ground signs warning the public of the presence of underground cables. The brief fails to demonstrate, however, that the presence of above-ground signs reveals the information shown on the drawings. The brief also suggests that the information is not a trade secret because the city may contract with third parties to use ducted facilities for the city's noncommercial telecommunications purposes. It has not demonstrated, however, that such third parties are actually in possession of or privy to the requested information. With respect to the fifth factor, the brief notes that Southwestern Bell expended \$8,000.00 to prepare the drawings, and argues that this fact "does not transform an otherwise public document into a secret. If this were the case, every time any regulated entity has to expend funds to develop any type of required report, it would automatically be a trade secret." Obviously, this fact alone is not sufficient to demonstrate that the requested information constitutes a trade secret, but when considered together with Southwestern Bell's other assertions it supports the contention that the requested information constitutes a trade secret. In addition, the brief argues that Southwestern Bell has waived any trade secret claim because it submitted the information to the city and because it did not provide supporting information to this office within 10 days of the request. We address the first argument above. With respect to the latter, the act's 10-day requirement applies only to governmental bodies. In sum, we conclude that the brief does not rebut Southwestern Bell's assertions as a matter of law.

If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Mary R. Crouter".

Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/SLG/rho

Ref.: ID# 25579

Enclosures: Submitted documents

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